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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

HERMAN R. TESTAN AND FRANCIS L. ZARRILLI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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INDEX

	Page
The Court of Claims lacked jurisdiction to entertain this suit since neither the Classification Act nor the Back Pay Act provides a monetary remedy for the period of a wrongful classification	2
A. The Tucker Act does not constitute a congressional waiver of the immunity of the United States from suits seeking money damages for allegedly improper civil service classifications	5
B. Violation of any statute or regulation governing federal employment does not automatically create a cause of action for money damages against the United States	11
Conclusion	19
Appendix	21

CITATIONS

Cases:	
Albemarle Paper Co. v. *Moody*, No. 74–389 decided June 25, 1975	16
Allison v. *United States*, 451 F. 2d 1035, 196 Ct. Cl. 263	15, 16
Amundson v. *United States*, 120 F. Supp. 201, 128 Ct. Cl. 80	14
Bell v. *Hood*, 327 U.S. 678	10
Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388	10

595-886—75——1

Cases—Continued: Page

Blaze v. *Moon*, 315 F. Supp. 495, affirmed 440 F. 2d 1348 ---- 11
Borak v. *United States*, 78 F. Supp. 123, 110 Ct. Cl. 236, certiorari denied, 335 U.S. 821 ---- 14
Chambers v. *United States*, 451 F. 2d 1045, 196 Ct. Cl. 186 ---- 15, 16
Clapp v. *United States*, 117 F. Supp. 576, 127 Ct. Cl. 505 ---- 7
Cort v. *Ash*, No. 73-1908, decided June 17, 1975 ---- 12
Daub v. *United States*, 292 F. 2d 895, 154 Ct. Cl. 434 ---- 13
Davis v. *Romney*, 490 F. 2d 1360 ---- 3
Dianish v. *United States*, 183 Ct. Cl. 702 ---- 18
Donnelly v. *United States*, 134 F. Supp. 635, 133 Ct. Cl. 120 ---- 14
Dvorkin v. *United States*, 101 Ct. Cl. 296, certiorari denied, 323 U.S. 730 ---- 14
Eastern Transportation Co. v. *United States*, 272 U.S. 675 ---- 8
Eastport S.S. Corp. v. *United States*, 372 F. 2d 1002, 478 Ct. Cl. 599 ---- 6, 7, 11, 12, 15
Edelman v. *Jordan*, 415 U.S. 651 ---- 3, 16, 17
Finn v. *United States*, 123 U.S. 227 ---- 15
Fletcher v. *United States*, 392 F. 2d 266, 183 Ct. Cl. 1 ---- 13
Ganse v. *United States*, 376 F. 2d 900, 180 Ct. Cl. 183 ---- 14
Glidden v. *United States*, 185 Ct. Cl. 515 ---- 13
Glidden Co. v. *Zdanok*, 370 U.S. 530 ---- 6
Gnotta v. *United States*, 415 F. 2d 1271, certiorari denied, 397 U.S. 934 ---- 3, 8

Cases—Continued Page

Greenway v. *United States*, 163 Ct. Cl. 72 ---- 13
Greenway v. *United States*, 175 Ct. Cl. 350, certiorari denied, 385 U.S. 881 ---- 13
Harmon v. *Brucker*, 355 U.S. 579 ---- 10
Jackson v. *Lynn*, 506 F. 2d 233 ---- 3, 8
Jackson v. *United States*, 428 F. 2d 844, 192 Ct. Cl. 765 ---- 13
Jacobs v. *United States*, 290 U.S. 13 ---- 9
Kamen Soap Products Co., Inc. v. *United States*, 110 F. Supp. 430, 124 Ct. Cl. 519 ---- 8
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 ---- 10, 17
Malone v *Bowdoin*, 369 U.S. 643 ---- 10
Mosca v. *United States*, 417 F. 2d 1382, 189 Ct. Cl. 283 ---- 6, 7
Munro v. *United States*, 303 U.S. 36 ---- 15
Newman v. *United States*, 143 Ct. Cl. 784 ---- 13
Pettit v. *United States*, 488 F. 2d 1026, 196 Ct. Cl. 207 ---- 15
Piccone v. *United States*, 407 F. 2d 866, 186 Ct. Cl. 752 ---- 13
Price v. *United States*, 80 F. Supp. 542, 112 Ct. Cl. 198 ---- 14
Price v. *United States and Osage Indians*, 174 U.S. 373 ---- 8
Regional Rail Reorganization Act Cases, 419 U.S. 102 ---- 9
Shaw v. *United States*, 357 F. 2d 949, 174 Ct. Cl. 899 ---- 13
Simon v. *United States*, 113 Ct. Cl 182 ---- 13
Soriano v. *United States*, 352 U.S. 270 ---- 8
Starzec v. *United States*, 145 Ct. Cl. 25 ---- 13
Summers v. *United States*, 510 F. 2d 123 ---- 8

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Cases—Continued:

	Page
Tierney v. *United States*, 168 Ct. Cl. 77	14
United States v. *Jones*, 131 U.S. 1	6
United States v. *King*, 395 U.S. 1	2, 6, 8, 11
United States v. *McLean*, 95 U.S. 750	14
United States v. *Michel*, 282 U.S. 656	8
United States v. *Shaw*, 309 U.S. 495	8, 15
United States v. *Sherwood*, 312 U.S. 584	3, 6, 10
United States v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506	15
United States v. *Wickersham*, 201 U.S. 390	13
Watson v. *United States*, 162 F. Supp. 755, 142 Ct. Cl. 749	13
Western Maid, The, 257 U.S. 419	10
Wheeldin v. *Wheeler*, 373 U.S. 647	12
Constitution, statutes and regulations:	
United States Constitution, Fifth Amendment	9
Back Pay Act of 1966, as amended, 5 U.S.C. 5596	14
Classification Act of 1949, 5 U.S.C. 5101	18
Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. 111) 2000e	16
42 U.S.C. 2000e–5(g)	16
Tucker Act, 28 U.S.C. 1491	7
5 C.F.R. 511.701	18
5 C.F.R. 511.702	18
5 C.F.R. 511.702	18
25 Comp. Gen. 604 (1946)	18
30 Comp. Gen. 156 (1950)	18
37 Comp. Gen. 492 (1958)	18
39 Comp. Gen. 583 (1960)	18
48 Comp. Gen. 502 (1969)	18
50 Comp. Gen. 581 (1971)	18

Cases—Continued:

	Page
52 Comp. Gen. 631 (1973)	18
53 Comp. Gen. 216 (1973)	18
3 Davis, *Administrative Law Treatise*, Section 27.02, p. 548, n. 1 (1958 ed.)	17
Developments in the Law, *Remedies Against the United States and its Officials*, 70 Harv. L. Rev. 827 (1957)	6, 9
Executive Order 11246, 30 Fed. Reg. 12319 (1965)	15
Executive Order 11478, 34 Fed. Reg. 12985 (1969)	15

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REPLY BRIEF FOR THE UNITED STATES

In our main brief we showed that the Court of Claims should have dismissed this suit for lack of jurisdiction and that, in any event, the Court of Claims erred in remanding the case to the Civil Service Commission with instructions that the Commission compare respondents' duties and classifications with those of other federal employees. We submit this reply brief to respond to various contentions made by respondents and the *amici curiae,* Melvin Allison, *et al.,* concerning the scope of the Court of Claims' jurisdiction.

THE COURT OF CLAIMS LACKED JURISDICTION TO ENTERTAIN THIS SUIT SINCE NEITHER THE CLASSIFICATION ACT NOR THE BACK PAY ACT PROVIDES A MONETARY REMEDY FOR THE PERIOD OF A WRONGFUL CLASSIFICATION

The central and, in our judgment, dispositive issue in this case is whether any federal statute expressly confers upon respondents a substantive right to recover money damages from the United States for the period of their allegedly wrongful civil service classifications. Since the scope of the Court of Claims' jurisdiction under the Tucker Act is limited to suits in which the claimant has a right to "actual, presently due money damages from the United States" (*United States* v. *King,* 395 U.S. 1, 3), the jurisdiction of the Court of Claims to entertain respondents' suit on its merits depended upon the existence of a statute—or combination of statutes—expressly waiving the traditional immunity of the United States from suits seeking money damages in the circumstances presented in respondents' complaint.

As demonstrated in our opening brief, the Tucker Act does not itself create any substantive right, enforceable against the United States, to "actual, presently due money damages" but merely confers jurisdiction on the Court of Claims whenever such a substantive right otherwise exists. We also demonstrated that the Classification Act, under which respondents claimed they had been wrongfully classified, does not contain any provision or provisions waiving the immunity of the United States to suits seeking back pay for the period of an improper classification.

Finally, although the Court of Claims did not address the issue, we showed that the Back Pay Act of 1966 does not apply to wrongful classification claims.

Thus, whether characterized as asserting a "lack of subject matter jurisdiction" or a "failure to state a cause of action upon which relief can be granted,"[1] we believe that the Court of Claims lacks authority to award money damages for the period of a wrongful federal civil service classification and that it should therefore have dismissed respondents' suit. In other words, the sole remedy of an employee who has been improperly classified is to obtain reclassification

[1] Some courts have held that there is no subject matter jurisdiction under the Tucker Act where the claimant, because of sovereign immunity, cannot establish a valid cause of action for money damages. *E.g.*, *Gnotta* v. *United States*, 415 F. 2d 1271, 1277–1278 (C.A. 8), certiorari denied, 397 U.S. 934. These cases reflect the view that sovereign immunity partakes of the nature of a jurisdictional bar (see *Edelman* v. *Jordan*, 415 U.S. 651, 677–678; *United States* v. *Sherwood*, 312 U.S. 584, 586–587), and that the Tucker Act does not confer subject matter jurisdiction in cases where there is no possibility of a money judgment.

Other courts have made a distinction in Tucker Act cases between subject matter jurisdiction and cause of action, suggesting that the requirement of subject matter jurisdiction might be satisfied if the claimant asserts a non-frivolous claim for money damages against the United States but that the claimant would still have to establish—on the merits—a cause of action for money damages. *E.g.*, *Jackson* v. *Lynn*, 506 F. 2d 233, 236–237 (C.A. D.C.); *Davis* v. *Romney*, 490 F. 2d 1360, 1370–1372 (C.A. 3).

But, at least in cases such as the present, the possible conceptual difference between subject matter jurisdiction and cause of action is without operative significance since, however characterized, the ultimate question presented in such cases is whether the immunity of the United States has been waived to the extent of providing for recovery in money damages. *Jackson* v. *Lynn*, *supra*, 506 F. 2d at 237 and n. 4; *Davis* v. *Romney*, *supra*, 490 F. 2d at 1371 n. 6.

595-886—75——2

for the future; reclassifications operate only prospectively, and do not create any right to back pay for past improper classifications.

Respondents and the *amici* have advanced two major arguments in support of the Court of Claims' jurisdiction, both of which relate ultimately to whether a cause of action for money damages in wrongful classification cases can be found by implication or must be expressly authorized. First, the *amici* claim (Br. 6, 8–9, 11–12, 20) that the Tucker Act waives sovereign immunity to any claim invoking a constitutional provision or a federal statute or regulation, so that the only remaining inquiry in this case is whether a cause of action for money damages can be "implied" from the Classification Act. This argument is bottomed on what the *amici* say is a fundamental distinction between "a substantive right" to money damages from the United States and "a waiver of sovereign immunity." Second, respondents and the *amici* argue (R. Br. 14–15; A. Br. 6, 9, 20–26) that the violation of any statute or regulation governing federal employment automatically creates a cause of action against the United States for money damages. This is so, we are told, because to hold otherwise would leave "rights without remedies."

Neither of these contentions is well founded. The sweeping arguments made by respondents and the *amici,* if accepted, would effectively overrule the well-established rule against implying congressional authority to collect from the public treasury and would render superfluous the many federal statutes—such as

the Back Pay Act—that expressly provide for a money damage remedy against the United States in carefully limited circumstances. Even if it is assumed that a congressional waiver of sovereign immunity appropriately can be found by implication, moreover, the language of the statutes relied upon by respondents and the history of the relationship between the federal government and its employees show conclusively that Congress did not intend to permit the award of back pay in the circumstances presented in respondents' complaint. This does not mean that federal civil service employees are without means of redressing wrongful classifications: to the contrary, Congress prescribed in the Classification Act an elaborate set of administrative safeguards to ensure general uniformity in classifications and to provide prospective relief in individual cases.

A. THE TUCKER ACT DOES NOT CONSTITUTE A CONGRESSIONAL WAIVER OF THE IMMUNITY OF THE UNITED STATES FROM SUITS SEEKING MONEY DAMAGES FOR ALLEGEDLY IMPROPER CIVIL SERVICE CLASSIFICATIONS

The principal argument offered by the *amici* in support of the Court of Claims' jurisdiction to entertain respondents' suit is that the Tucker Act not only waives the immunity of the United States to any cause of action "founded * * * upon * * * any Act of Congress" but makes available as well any "generally accepted and important form of redress"—including redress in money damages (see Br. 7–11). This means, according to the *amici* (Br. 6), that "[t]he failure of the Classification Act of 1949 ex-

pressly to authorize suits in the Court of Claims for damages or to waive the sovereign immunity of the United States" does not bar that court from exercising jurisdiction over respondents' suit.

1. This Court has held repeatedly, however, that the Court of Claims' jurisdiction under the Tucker Act extends only to those claims that are "limited to actual, presently due money damages from the United States." *United States* v. *King, supra,* 395 U.S. at 3; accord, *e.g., Glidden Co.* v. *Zdanok,* 370 U.S. 530, 557; *United States* v. *Jones,* 131 U.S. 1, 18. As noted in our opening brief, the Tucker Act does not itself create any "entitlement" or substantive right, enforceable against the United States, to "actual, presently due money damages." The Tucker Act merely confers jurisdiction in the Court of Claims whenever such an entitlement or substantive right otherwise exists. See *Mosca* v. *United States,* 417 F. 2d 1382, 1386, 189 Ct. Cl. 283, 290; *Eastport S.S. Corp.* v. *United States,* 372 F. 2d 1002, 1007–1009, 178 Ct. Cl. 599, 605–607; Developments in the Law, *Remedies Against the United States and Its Officials,* 70 Harv. L. Rev. 827, 882 (1957).

It is also settled that the existence of a substantive right to a money damage remedy against the United States depends wholly upon the extent to which the United States has waived its immunity. *E.g., United States* v. *Sherwood,* 312 U.S. 584, 586. In cases such as the present, in which the claimant does not base his claim upon a contract or seek the return of money that he has paid over to the government, the as-

serted entitlement to money damages depends upon whether any federal statute "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport SS. Corp* v. *United States, supra,* 372 F. 2d at 1009; accord, *Mosca* v. *United States, supra,* 417 F. 2d at 1386.[2]

[2] The Tucker Act specifies that a claim of entitlement to money damages must be "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" (28 U.S.C. 1491). So far as noncontractual cases are concerned, the Court of Claims has said that claims of entitlement to money damages usefully may be grouped into two rough categories: "those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury." *Eastport S.S. Corp.* v. *United States, supra,* 372 F. 2d at 1007; see also *Clapp* v. *United States,* 117 F. Supp. 576, 580, 127 Ct. Cl. 505, 512.

Where a claimant seeks the return of his own money, alleged to have been wrongfully collected and withheld by the government, the claimant's recovery would draw upon a "fund" created by the claimant himself. The interests of the general citizenry in preservation of the public fisc are only incidentally involved in such cases since, if wrongfully collected and withheld, the money paid to the government by the claimant could not in theory properly be dispersed to defray the cost of government operations. By contrast, where the claimant seeks recovery from the general public treasury of monies not directly derived from payments by him, his recovery would draw upon a "fund," derived from all the citizenry, that exists only because of the lawful exercise of the government's power to collect and retain money from all the people. In the latter class of cases, therefore, express congressional authority "mandating compensation" is required before the claimant may recover. See, *e.g., Eastport SS. Corp.* v. *United States, supra,* 372 F. 2d at 1008–1009.

Before such an entitlement exists, the claimant must be able to point to express congressional authority for the damage claim.

It is not sufficient for these purposes (or, indeed, even relevant to the ultimate determination) that the creation of a money damage remedy against the United States might be thought responsive to a particular conception of enlightened public policy (see A. Br. 9–11). The only issue is whether Congress, in express and unequivocal terms, has waived a portion of the traditional sovereign immunity of the United States by creating a substantive right to money damages in favor of the claimant. *E.g., Summers* v. *United States,* 510 F. 2d 123, 124–125 (C.A. 8); *Jackson* v. *Lynn, supra,* 506 F. 2d at 236–237; *Gnotta* v. *United States, supra,* 415 F. 2d at 1276–1278; see also *United States* v. *King, supra,* 395 U.S. at 4; *Soriano* v. *United States,* 352 U.S. 270, 276; *United States* v. *Shaw,* 309 U.S. 495, 500; *United States* v. *Michel,* 282 U.S. 656, 659; *Eastern Transportation Co.* v. *United States,* 272 U.S. 675, 686; *Price* v. *United States and Osage Indians,* 174 U.S. 373, 375–376.

2. The *amici's* efforts to avoid application of these settled principles to the present case lead them into a variety of areas wholly unrelated to the claim for money damages made here by respondents. Thus, the *amici* point (Br. 11) to *Kamen Soap Products Co., Inc.* v. *United States,* 110 F. Supp 430, 124 Ct. Cl. 519, in support of their assertion that the Tucker Act eliminates from this case any consideration of the sovereign immunity of the United States. But *Kamen*

concerned simply the power of the Court of Claims to issue, in connection with a suit concededly within its jurisdiction, a subpoena *duces tecum* against an officer or employee of the United States.

Equally beside the point is the *amici's* citation (Br. 11) of the *Regional Rail Reorganization Act Cases,* 419 U.S. 102, which involved the Just Compensation Clause of the Fifth Amendment. That constitutional provision long has been recognized as creating, of its own force, a cause of action under the Tucker Act. The reason for this is that the right to recover monetary compensation for a Fifth Amendment taking, even absent a specific statutory predicate, is both consistent with the language of the Fifth Amendment ("nor shall private property be taken for public use, without just compensation") and required to give meaning to the provision. See *Jacobs* v. *United States,* 290 U.S. 13, 16; and see generally, Developments in the Law, *supra,* 70 Harv. L. Rev. at 876–879. The cases interpreting the Just Compensation Clause are thus closely tied to the language and purpose of that particular constitutional provision, and provide no support for the *amici's* assertion that the Tucker Act eliminates from this case any consideration of the sovereign immunity of the United States.

Neither is the *amici's* argument advanced by their insistence (Br. 8–9, 12–13 n. 14) that there is a fundamental distinction between "a substantive right" to money damages from the United States and "a waiver of sovereign immunity." There cannot be a substantive right to money damages from the United States

without a corresponding waiver of sovereign immunity. Cf. *The Western Maid*, 257 U.S. 419, 433. But that does not mean that substantive rights and waivers of sovereign immunity are always coterminous. Thus, for example, the defense of sovereign immunity may be unavailable to persons acting under color of federal law, but in a manner inconsistent with a specific constitutional prohibition or beyond their statutory powers. See, *e.g.*, *Malone* v. *Bowdoin*, 369 U.S. 643, 647; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n. 11, 701–702. But where the United States is the party defendant, Congress cannot be deemed to have engaged in the futility of creating a "substantive right" to money damages against the United States without concomitantly having waived the immunity of the United States to suit.[3] Indeed, the creation of such a right against the United States necessarily constitutes a waiver of sovereign immunity.

[3] The *amici's* reliance (Br. 20–21) upon cases in which the United States was not the defendant and in which the immunity of the United States was not directly at issue (*e.g.*, *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388; *Harmon* v. *Brucker*, 355 U.S. 579; *Bell* v. *Hood*, 327 U.S. 678) is therefore misplaced. The underlying issue in those cases was not whether the United States had waived its immunity to particular types of claims but whether individual defendants, allegedly acting unconstitutionally or beyond their statutory powers, were entitled to the historic protection from suit accorded the sovereign.

The remaining authorities cited by the *amici* are similarly irrelevant to the immunity issue posed by respondents' claim for money damages against the United States. The passage from *United States* v. *Sherwood*, *supra*, 312 U.S. at 586–587

B. VIOLATION OF ANY STATUTE OR REGULATION GOVERNING FEDERAL EMPLOYMENT DOES NOT AUTOMATICALLY CREATE A CAUSE OF ACTION FOR MONEY DAMAGES AGAINST THE UNITED STATES

The *amici* contend (Br. 9) that "in the context of government employment, the general rule is that an implied cause of action [for money damages] does exist wherever an employee's rights, whether created by the Constitution, Act of Congress, or executive regulation, have been violated." The *amici* proceed from that premise to argue (Br. 26) that, since a money damage remedy exists for wrongful classifications in the absence of an express congressional denial of that remedy, the absence of "anything in the legislative history of the Classification Act of 1949 remotely suggesting that Congress intended in that Act to create rights without remedies * * * is fatal in light

(Tucker Act confers jurisdiction only over suits brought solely against the United States), quoted by the *amici* (Br. 12), states only that the Tucker Act confers upon the Court of Claims "[j]urisdiction to entertain suits against the United States to recover damages for breach of contract and certain other specified classes of claims * * *." That is a far cry, however, from a statement that sovereign immunity is irrelevant in determining whether a federal statute "embodies a command to the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet" (*Eastport S.S. Corp.* v. *United States*, *supra*, 372 F. 2d at 1008).

The *amici* also cite (Br. 11–12) cases such as *United States* v. *King*, *supra* (Court of Claims held to lack jurisdiction to issue declaratory judgments), and *Blaze* v. *Moon*, 315 F. Supp. 495 (S.D. Tex.), affirmed, 440 F. 2d 1348 (C.A. 5) (Court of Claims held to lack jurisdiction to issue injunctions). But those cases do not contain any language supporting the *amici's* view that all one need do is plead or assert an entitlement to money damages and the Tucker Act automatically eliminates any consideration of sovereign immunity.

595-886—75——3

of the well-settled principle that remedies will be presumed when rights are created and the long history of awards of back pay to government employees based upon an implied cause of action." See also A. Br. 21–26, R. Br. 14–15. Neither the premise nor the conclusion is correct.

1. Even in cases involving only claims against private parties, the violation of a federal statute does not automatically give rise to a cause of action for money damages. See, *e.g., Cort* v. *Ash,* No. 73–1908, decided June 17, 1975; *Wheeldin* v. *Wheeler,* 373 U.S. 647. As already noted (see discussion at pp. 6–8, *supra*), moreover, where the United States is the party defendant, and the claimant is not suing for money improperly exacted or retained, the basis of the federal claim—whether the Constitution, a statute or a regulation—does not create a cause of action for money damages unless "in itself" it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport SS. Corp.* v. *United States, supra,* 372 F. 2d at 1008, 1009; accord, authorities cited at pp. 6–8, *supra.* Respondents and the *amici* have failed to cite any authority or to articulate any policy reasons justifying the suspension of these legal principles in the context of suits seeking reclassification.

This is not a wrongful discharge case, and the extensive reliance both by respondents and the *amici* on cases involving wrongful discharges or suspensions is consequently misplaced. When a person has been legally appointed to a particular position, he is entitled to the privileges and emoluments of that position until he has been legally disqualified. Thus, this Court stated in *United States* v. *Wickersham,* 201 U.S. 390, 399–400:

> [T]he question is whether the employee during his wrongful suspension by a subordinate officer is entitled to the compensation provided by law. We see no reason in such an attitude of the case, where the wrongful suspension is clearly established, and the ability of the incumbent to discharge the duties of his office affirmatively found, for withholding from him the compensation given by law to an incumbent of the place. * * * Where an officer is wrongly suspended by one having no authority to make such an order, he ought to be, and is, entitled to the compensation provided by law during such suspension. * * *
>
> The case comes to this: The appellee, by his appointment, * * * was entitled to the privileges and emoluments of his position until he was legally disqualified by his own action or that of some duly authorized public authority.[4]

[4] The cases involving wrongful discharges or suspensions, upon which respondents and the *amici* rely (see R. Br. 16; A. Br. 17–18, 21, 23–24), include *United States* v. *Wickersham, supra; Jackson* v. *United States,* 428 F. 2d 844, 192 Ct. Cl. 765; *Piccone* v. *United States,* 407 F. 2d 866, 186 Ct. Cl. 752; *Glidden* v. *United States,* 185 Ct. Cl. 515; *Fletcher* v. *United States,* 392 F. 2d 266, 183 Ct. Cl. 1; *Greenway* v. *United States,* 175 Ct. Cl. 350, certiorari denied, 385 U.S. 881; *Shaw* v. *United States,* 357 F. 2d 949, 174 Ct. Cl. 899; *Greenway* v. *United States,* 163 Ct. Cl. 72; *Daub* v. *United States,* 292 F. 2d 895, 154 Ct. Cl. 434; *Starzec* v. *United States,* 145 Ct. Cl. 25; *Newman* v. *United States,* 143 Ct. Cl. 784; *Watson* v. *United States,* 162 F. Supp. 755, 142 Ct. Cl. 749; and *Simon* v. *United States,* 113 Ct. Cl. 182.

In the present case, however, the claim is not that the respondents have been denied the benefits of the position to which they were appointed but that they have been denied the benefits of positions to which they should have been but were not appointed. Although persons wrongfully discharged or suspended from positions with the federal government are entitled to continued enjoyment of the privileges and emoluments of office until lawfully excluded (see Back Pay Act of 1966, as amended, 5 U.S.C. 5596), the rule has long been that persons are not entitled to the benefits of a position until they have been duly appointed to that position. *E.g., United States* v. *McLean,* 95 U.S. 750; *Ganse* v. *United States,* 376 F. 2d 900, 180 Ct. Cl. 183; *Tierney* v. *United States,* 168 Ct. Cl. 77; *Donnelly* v. *United States,* 134 F. Supp. 635, 133 Ct. Cl. 120; *Amundson* v. *United States,* 120 F. Supp. 201, 128, Ct. Cl. 80; *Price* v. *United States,* 80 F. Supp. 542, 112 Ct. Cl. 198; *Borak* v. *United States,* 78 F. Supp. 123, 110 Ct. Cl. 236, certiorari denied, 335 U.S. 821; *Dvorkin* v. *United States,* 101 Ct. Cl. 296, certiorari denied, 323 U.S. 730. As noted in our opening brief, there is nothing in the Classification Act even remotely suggesting that Congress intended to alter this long-standing rule. Consequently, a person appointed to a grade GS–13 position—such as respondents—is entitled to the benefits of only that position, unless and until he is appointed to a position at a different grade level.

Respondents and the *amici* also rely heavily (R. Br. 14–18, A. Br. 23–24) upon two recent Court of

Claims' decisions, *Chambers* v. *United States,* 451 F. 2d 1045, 196 Ct. Cl. 186, and *Allison* v. *United States,* 451 F. 2d 1035, 196 Ct. Cl. 263, dealing with claims of racial discrimination arising in connection with decisions whether to employ (*Chambers*) or promote (*Allison*). But we noted in our opening brief, and the *amici* concede (Br. 3–5), that those cases are in certain respects distinguishable from the present case. Most importantly, in neither *Chambers* nor *Allison* did the Court of Claims hold that the Classification Act or the Back Pay Act waives the immunity of the United States to suits seeking money damages for wrongful civil service classifications.[5]

[5] For many of the reasons already noted, moreover, we believe that *Chambers* and *Allison* were wrongly decided: specifically, (1) there is nothing in the executive orders (Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11478, 34 Fed. Reg. 12985 (1969)) relied upon in *Chambers* and *Allison* that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" as a result of their violation (*Eastport S.S. Corp.* v. *United States, supra,* 372 F. 2d at 1009; see also authorities discussed at pp. 6–8, *supra*); (2) even if the executive orders fairly could be so interpreted, only Congress has the power to waive the immunity of the United States to suit (*e.g., United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 513; *United States* v. *Shaw, supra,* 309 U.S. at 500–502; *Munro* v. *United States,* 303 U.S. 36, 41; *Finn* v. *United States,* 123 U.S. 227, 232); (3) the plaintiffs in *Allison* did not present a claim for "presently due" money damages, a remand being necessary in that case to "create" an entitlement to reclassification enforceable by the court through an award of money damages; and (4) both *Chambers* and *Allison*—like *Pettit* v. *United States,* 488 F. 2d 1026, 196 Ct. Cl. 207, and the present case, which built upon the foundation laid in *Chambers* and *Allison*—were decided over vigorous dissents, represented a radical departure from

2. Our position is not, as the *amici* would have it (see Br. 9–10 and n. 11, 15, 18, 21, 24–26), that Congress left respondents without remedy for their allegedly wrongful civil service classifications. Instead, our position is that Congress has not made available to persons wrongfully classified the remedy of either retroactive reclassification or money damages.[6]

prior Court of Claims' decisions, and have been disregarded or questioned in similar cases decided by the Court of Claims since the filing of our brief on the merits in this case (see decisions reprinted in Appendix, *infra*).

The importance of the rulings in *Chambers* and *Allison* has substantially diminished since the passage of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. (Supp. III) 2000e *et seq.* (effective March 24, 1972), which expressly provides for back pay in cases of racial discrimination in federal employment. See 42 U.S.C. 2000e–5(g); *Albemarle Paper Co.* v. *Moody*, No. 74–389, decided June 25, 1975.

[6] There is a fundamental distinction, which respondents and the *amici* ignore, between prospective reclassification, on the one hand, and retroactive reclassification and money damages, on the other. This Court's decision in *Edelman* v. *Jordan*, 415 U.S. 651, presents an illustration of this distinction. *Edelman* was a class action brought against various officials of the State of Illinois to recover, *inter alia*, retroactive benefits under federal-state programs of Aid to the Aged, Blind and Disabled which had been withheld from class members when the State failed to comply with federally-imposed timetables for the processing of applications. Although this Court did not disturb so much of the lower courts' orders requiring the named officials to comply in the future with federally-imposed processing requirements, it did reverse that portion of the court of appeals' decision that permitted the recovery of retroactive benefits from the State. In response to plaintiffs' argument that such payments amounted to "equitable restitution," this Court held that retroactive benefits are "in practical effect indistinguishable in many aspects

But this does not mean the Classification Act creates "rights without remedies" (A. Br. 26). The fallacy in the *amici's* assertion that acceptance of our position would leave respondents without redress for their allegedly wrongful classifications, and would render the Classification Act a mere "hortatory catalogue of high principles" (Br. 15), is revealed by their own discussion of the provisions of the Classification Act (Br. 13–15). Neither reason nor authority supports the proposition, implicit in the *amici's* "rights/remedies" argument, that redress in money damages must be implied for the failure to meet in individual cases the policy goals declared by Congress if those goals are to be met.[7]

from an award of damages against the State" (415 U.S. at 668) and that they were therefore barred by the sovereign immunity principles contained in the Eleventh Amendment.

The principles of sovereign immunity applied in *Edelman* are analogous in essential respects to those applicable to suits against the United States. See *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra;* 3 Davis, *Administrative Law Treatise*, Section 27.02, p. 548 n. 1 (1958 ed.).

[7] As we noted in our opening brief, respondents have filed a mandamus action in the United States District Court for the Eastern District of Pennsylvania, seeking an order directing the Civil Service Commission to reclassify their positions to grade GS–14. *Testan and Zarrilli* v. *Hampton, et al.* (Civil Action No. 71–2250). If respondents should decide to proceed with that action, the government will not contest the district court's jurisdiction to entertain respondents' claim for prospective equitable relief.

Regardless of the forum, however, respondents are not entitled either to back pay or retroactive reclassification. The unavailabil-

The sweeping and overbroad claims made by respondents and the *amici,* if accepted, would render superfluous the many federal statutes—such as the Back Pay Act—which expressly provide for a money damage remedy against the United States in carefully limited circumstances. There is no reason in policy, and respondents and the *amici* suggest none, which would justify the categorical disregard of the limitations Congress has placed upon payment out of the public treasury of the United States. More specifically, neither reason nor authority supports the contention that the Classification Act is unenforceable save through suits for retroactive back pay or that the administrative procedures provided for by Congress in the Classification Act will leave without sanction departures from the goal of "equal pay for substantially equal work" (5 U.S.C. 5101).

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ity of retroactive relief is confirmed by regulations issued by the Civil Service Commission (see 5 C.F.R. 511.701, 511.702) and by a series of decisions rendered by the Comptroller General of the United States holding that, in general, reclassifications may not be made retroactively effective in the absence of a statute expressly so providing but that they may become effective—for salary and other purposes—on the date on which the reclassification action is taken by the administrative official vested with proper authority or on some reasonable future date fixed by the administrative official. See, *e.g.*, 52 Comp. Gen. 631 (1973); 48 Comp. Gen. 502 (1969); 39 Comp. Gen. 583 (1960); 37 Comp. Gen. 492 (1958); 30 Comp. Gen. 156 (1950); 25 Comp. Gen. 604 (1946); see also *Dianish* v. *United States*, 183 Ct. Cl. 702, 718; 53 Comp. Gen. 216 (1973); 50 Comp. Gen. 581 (1971).

CONCLUSION

For the foregoing reasons, as well as the reasons stated in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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OCTOBER 1975.

APPENDIX

In the United States Court of Claims

No. 86–74

REX L. APPLEGATE, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

Before KASHIWA, *Judge*, Presiding, LARAMORE, *Senior Judge*, and BENNETT, *Judge*.

ORDER

This civilian pay case is before the court on cross-motions for summary judgment. Plaintiffs are employes of the United States Customs Service (formerly the Bureau of Customs, Department of the Treasury). Their employment at the Bureau of Customs began in the early Winter of 1971, when they were appointed as trainees at the GS–7 level. The Standard Form 50, "Notification of Personnel Action," received by each plaintiff at the time of appointment, contains the following language:

> "Trainee to journeyman promotion to GS–9 due [1 year from commencement of employment] providing all requirements are met."

Plaintiffs also received oral assurances of promotion similar to the above-written language.

On December 11, 1972, the President of the United States ordered a freeze on, *inter alia*, virtually all promotions of Federal civilian employees. The freeze was

lifted for Bureau of Customs employees on March 4, 1973, and plaintiffs were thereafter promoted to grade GS–9. The net result of the freeze was a delay of 2 to 3 months in the promotions anticipated for each plaintiff upon the completion of his first year of service. The relief sought is correction of records to show promotion to grade GS–9 at the end of 1 year of service and recovery of the difference in pay between the higher and lower grades during the period of delay.

Plaintiffs first argue as a basis for recovery that the assurances of promotion they received were promises, the acceptance of which created contracts between plaintiffs and the Government. It is contended that the freeze on promotions was a breach of those contracts. We reject this contention and reaffirm that employment (and the perquisites thereof) by appointment with the Government does not create a contractual relationship. *Hopkins* v. *United States,* 206 Ct. Cl. —— (March 1975); *Urbina* v. *United States,* 192 Ct. Cl. 875, 428 F. 2d 1280 (1970). Nor did plaintiffs otherwise have any "legal entitlement" to promotion at the end of 1 year of employment. Appointment and promotion of employees are, of course, discretionary matters within the agency. *Hirsch* v. *United States,* 205 Ct. Cl. 256, 499 F. 2d 1248 (1974); *Tierney* v. *United States,* 168 Ct. Cl. 77 (1965); *Amundson* v. *United States,* 128 Ct. Cl. 80, 120 F. Supp. 201 (1954). There is no statute or regulation which mandates promotion of plaintiffs under these circumstances. Furthermore, the very assurances of promotion given to plaintiffs were conditioned on "all requirements" being met. The availability of funds to pay the higher salaries of promoted employees is an assumed contingency to promotion and must be considered as a "requirement" within the meaning of the language of

plaintiffs' Standard Form 50's. *See, e.g., Allison* v. *United States,* 196 Ct. Cl. 263, 269, 451 F. 2d 1035, 1038 (1971).

Plaintiffs' second asserted basis for recovery is that the Office of Management and Budget's (OMB) refusal to exempt plaintiffs from the President's freeze order was arbitrary and capricious. Insofar as relevant here, the OMB had been empowered by the President to grant exceptions to the freeze "where essential" "to protect property" or "to preserve the continuity of government." Assuming, without deciding, that arbitrary and capricious action by the OMB would be the basis for an action in this court, we conclude that the OMB's action was neither arbitrary nor capricious. The OMB could reasonably conclude that plaintiffs' promotions were not essential to protect property or to preserve the continuity of government. In addition, the OMB's action was consistent with guidelines prepared by the Civil Service Commission, which guidelines did not recognize "career program, career ladder, or similar promotion patterns" to constitute valid exceptions to the freeze.

IT IS THEREFORE ORDERED, upon consideration of the arguments made by the parties both in briefs and orally, that plaintiffs' motion for summary judgment be and the same is hereby denied, and defendant's cross-motion for summary judgment is granted. Plaintiffs' petition is dismissed.

By the Court:

SHIRO KASHIWA,
Judge, Presiding.

JUNE 27, 1975.

BEST COPY AVAILABLE

In The United States Court of Claims

No. 264–73

GERALD J. ROSEMAN

v.

THE UNITED STATES

Before SKELTON, *Judge,* Presiding, KUNZIG and BENNETT, *Judges.*

ORDER

This military pay case comes before us on defendant's motion to dismiss plaintiff's petition for failure to state a claim upon which relief can be granted.

Plaintiff, a Major in the Air Force, brings this action under the Tucker Act, 28 U.S.C. § 1491, as amended (Supp. 1972), seeking a retroactive promotion to the rank of Lt. Colonel, effective April 22, 1974, with corresponding back pay and correction of his military records. Additionally, plaintiff seeks correction of his military records to reflect a previously granted promotion to the rank of Major, effective November 11, 1967.

Upon consideration of defendant's memorandum in support of its motion, plaintiff's memorandum in opposition and without oral argument, we conclude plaintiff has failed to state a claim within the jurisdiction of this court.

An absolute prerequisite to our jurisdiction is a claim for a money judgment presently due. *United States* v. *King,* 395 U.S. 1 (1969); *Kirby* v. *United States,* 201 Ct. Cl. 527, 537 (1973), *cert. denied,* 417

U.S. 919 (1974). While plaintiff has proposed a novel twist, his failure to present an independent monetary claim is fatal to his case. The only potential claim for a money judgment presented in plaintiff's petition is retroactive pay in the rank of Lt. Colonel. This back pay claim is contingent on our first ordering plaintiff's promotion in a case where the promotion is within the discretionary zone. We have held that this court is not in the promotion business. *Yee* v. *United States,* —— Ct. Cl. ——, 512 F. 2d 1383 (1975). But even if we were in the "promotion business," such relief could only be granted incidental to, and not independent of, a monetary judgment.

Since plaintiff has not presented an independent monetary claim upon which this court can grant relief, his request for correction of his military records must likewise be dismissed. Although Pub. L. 92–415 would permit this court to order the correction of military records incidental to the award of a money judgment, this statute does not provide an independent jurisdictional basis.

In his opposition to the present motion, plaintiff has asked us to transfer his case to a United States District Court under our 28 U.S.C. § 1506 transfer power in the event we find our jurisdiction wanting. We deny this request.

Our § 1506 transfer authority exists in situations where we find the claim presented to be in the exclusive jurisdiction of a United States District Court. Plaintiff's case, as pleaded, is not within the exclusive jurisdiction of the District Court. Plaintiff's petition names the United States as defendant. Under such caption, the District Court's jurisdiction, if any, would be concurrent with ours, under the Tucker Act, but not exclusive.

IT IS THEREFORE ORDERED defendant's motion to dismiss is granted and the petition is dismissed. Plaintiff's request for transfer under 28 U.S.C. § 1506 is denied.

By the Court:

BYRON SKELTON,
Judge, Presiding.

JUNE 27, 1975.

In the United States Court of Claims

No. 292–69

EMIL W. KAESERMAN

v.

THE UNITED STATES

Before NICHOLS, *Judge*, Presiding, KASHIWA and KUNZIG, *Judges*.

ORDER

This case was originally briefed and argued before the full court on cross motions for summary judgment. By order dated June 1, 1973, the court with three judges dissenting, remanded the case to the Army Board for Correction of Military Records (ABCMR), 202 Ct. Cl. 1081. The suit is for commissioned officer's pay during a period of years when the plaintiff actually was employed as an enlisted man, having been rejected for return to active duty in the reserve officer rank he held. The circumstances included a 1947 diagnosis of plaintiff as suffering from herniated nucleus pulposus, which the Surgeon General in 1965 held was and had been erroneous. This diagnosis did not disqualify plaintiff from active duty as an enlisted man but for reasons not fully or at all explained, did disqualify him as an officer in a rank he had previously held. See the prior order for further details. The remand did not dispose of the motions, and such disposal is now possible. The

parties have filed supplemental briefs and argued the case orally before this panel. Since the oral argument plaintiff has filed a motion, which we have allowed, for leave to file another supplemental brief and such further brief has been considered.

The ABCMR took the case as directed and granted plaintiff a hearing. It obtained *ex parte* a further report from the Surgeon General. In light of that further report, it is not as clear as it previously appeared that the disqualification decisions of 1948 and later relating to plaintiff's physical fitness for active duty as an officer were in error. The ABCMR finds in effect they were correct. The plaintiff, taking the opposite side of the coin, also contended to the ABCMR that when retired he was disabled and should have received a disability retirement as a Colonel.

As we read the ABCMR, even if the medical evidence in the case were unchanged from when it was before us previously, it would be impossible because too speculative to postulate a constructive active duty credit as an officer for this plaintiff from 1948 to 1966. This is what we wanted the Board to determine. Though 3d Army apparently wanted plaintiff on active duty with it, the Board says there was little need to recall officers of his specialty in 1948 when he applied. We must presume this statement is based on fact and is not a fabrication. If there was a need in 1950, the Korean war period, it would be impossible to say how long plaintiff would have served or what rank he would have attained. There is no way we can say the Board was arbitrary and capricious in drawing this conclusion as to a matter within its expertise. Assuming the Board to be unwilling to exercise its discretion favorably in the premises, there is no way this court can constructively and retroactively order active duty

or promotions in rank. *Abruzzo* v. *United States,* 206 Ct. Cl. (No. 141–73, decided April 16, 1975). If the discretion were ours, how we would exercise it is not for consideration here.

The claim that plaintiff was disabled on retirement in 1966 was apparently an attempt to exploit plaintiff's repeated rejections on physical grounds as a kind of estoppel. Plaintiff applied for retirement on longevity grounds and a medical Board at that time found he was fit for further active duty. We do not think the ABCMR was arbitrary and capricious in denying a disability retirement, especially since plaintiff linked this claim, inextricably so far as the ABCMR decision reveals, with the contention he should have been retired as a Colonel. The rank at retirement and the character of retirement are logically two distinct issues, but if the applicant for relief links them together as one, the ABCMR is not arbitrary and capricious in doing the same.

We do not think the ABCMR committed any error reversible by us in obtaining *ex parte* a further medical report from the Surgeon General, for use in considering plaintiff's requests for discretionary relief. *Merson* v. *United States,* 173 Ct. Cl. 92, 97–98 (1965).

The 1973 order in this case anticipated *Testan* v. *United States,* 205 Ct. Cl. 330, 499 F. 2d 690 (1974), *cert. granted,* 420 U.S. 923 (1975), in holding that under authority of Pub. L. 92–415 amending 28 U.S.C. § 1491, we could remand a case to an administrative body for consideration or reconsideration of relief we could not ourselves directly grant because essentially discretionary, when a favorable decision below would generate a valid money claim. Pending the outcome of *Testan,* in the Supreme Court, this order is not to be read as affirming or disaffirming our belief in the existence of such power.

In view of the foregoing, plaintiff's motion for summary judgment is denied, defendant's motion for summary judgment is granted, and the petition is dismissed.

By the Court:

PHILIP NICHOLS, JR.,
Judge, Presiding.

KUNZIG, *Judge,* concurs in the result.

JUNE 27, 1975.

In the United States Court of Claims

No. 432–74

JAMES E. BARNUM

v.

THE UNITED STATES

Before COWEN, *Chief Judge,* DAVIS and KASHIWA, *Judges.*

ORDER

This case comes before the court on defendant's motion to dismiss plaintiff's petition. Plaintiff, an Army officer on active duty in Taiwan, seeks a retroactive promotion from the rank of Major to Lieutenant Colonel or, alternatively, for an order directing that he be placed before an Army Standby Advisory Board to be considered for promotion. He also seeks retroactive pay and allowances if the promotion is granted, requests that a challenged efficiency report be expunged from his records, and asks the court to render a declaratory judgment that certain regulations relating to the Army Board for the Correction of Military Records are unconstitutional. Upon consideration of defendant's motion and plaintiff's objection thereto, the court finds:

(1) Plaintiff challenges an efficiency report rendered for service during the period October 9, 1967 to June 26, 1968, on the ground that the reporting system used at the time the efficiency report was rendered was subject to a general inflation in the case of some officers and that the report rendered as to

plaintiff under the new system unduly penalized an officer such as plaintiff, whose rater and endorser made a conscientious effort to deflate the rating system in response to guidance from headquarters.

(2) In an effort to have the challenged efficiency report removed from his records and to obtain promotion, plaintiff has appealed to the Army Special Review Board, Office of the Adjutant General, and to the Army Board for the Correction of Military Records.

(3) The Army Special Review Board found that the evidence submitted by plaintiff was not sufficient to justify withdrawal or alteration of the efficiency report, and the Army Board for the Correction of Military Records denied his application.

(4) For the purpose of defendant's motion, plaintiff's allegations regarding the circumstances under which the challenged efficiency rating was made, are accepted as true. However, such circumstances did not invalidate the discretionary authority of Army officials to deny plaintiff's promotion.

Having decided that defendant's motion to dismiss should be treated as a motion for summary judgment in order to consider the documentary evidence offered by plaintiff, the court concludes as follows:

(A) The retroactive promotion of plaintiff with back pay would involve an intrusion into the discretionary military promotion processes which is not justified in this case where plaintiff does not have a clear legal entitlement to the pay of a higher rank. *Doggett* v. *United States,* No. 459–73 (Ct. Cl., decided July 11, 1975); *Cooper* v. *United States,* 203 Ct. Cl. 300 (1973); *Abruzzo* v. *United States,* 206 Ct. Cl. — (1975).

(B) Since the court is not authorized to grant plaintiff monetary relief in this case, his request for an order to have the challenged efficiency report removed from his record and for a judgment declaring the regulations unconstitutional must be denied on the ground that these claims are outside the court's jurisdiction. *See Austin* v. *United States,* No. 5–74 (Ct. Cl., decided April 16, 1975) and *Jankovic* v. *United States,* 204 Ct. Cl. 807 (1974). This holding is also applicable to plaintiff's request for an order that he be placed before the Army Standby Advisory Board for purposes of early promotion.

It is therefore ordered that defendant's motion for summary judgment is granted and plaintiff's petition is hereby dismissed.

By the Court:

NELSON COWEN,
Chief Judge.

AUGUST 1, 1975.

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